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SUPREME COURT, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

MICHAEL WAYNE JENNINGS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a criminal defense attorney provides ineffective assistance of counsel at trial by failing to present a defense which is not merely contrary to the defendant's wishes and unsupported by the evidence, but which – as a matter of law – could not mitigate the defendant's guilt.

2. Whether the Ninth Circuit is undermining this Court's precedents regarding ineffective assistance of counsel by routinely using hindsight to second-guess the reasonableness and impact of trial attorneys's decisions.

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PETITION FOR WRIT OF CERTIORARI

Jeanne Woodford, Warden, California State Prison at San Quentin (hereafter the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals is reported at *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002). Appendix ("App.") A. The order denying rehearing and denying rehearing en banc is unreported. App. B. The judgment of the District Court is unreported. App. C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief as to the guilt and penalty phases of this capital case was entered on May 10, 2002. The State's petition for rehearing and suggestion for rehearing en banc was denied June 19, 2002. On September 3, 2002, Justice O'Connor extended the State's time to file a certiorari petition to October 17, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Jennings's Trial For The Murder Of Violet Newman[1/]

Sixty-three-year-old Violet Newman was murdered in her home around midnight on Saturday, August 7, 1982. Forensic evidence showed that Newman had been tied up and violently raped, then repeatedly stabbed with a large knife. Her purse lay open at the foot of her bed. Her wallet, checkbook, and telephone answering machine were missing. The house was locked shut.

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1. The facts presented here are taken almost entirely from the California Supreme Court's opinion affirming the conviction. *See* App. D at 51-54, *People v. Jennings,* 46 Cal.3d 963, 972-974, 251 Cal. Rptr. 278 (1988).

Michael Jennings was connected to the murder by strong circumstantial evidence. Jennings had grown up in the house next door to Newman and had lived with his parents until shortly before the killing. Pieces of strapping tape and rope, like those found near Newman's bed, were discovered in Jennings's pickup truck a few days after the crime. Semen found on Newman's body was aspermatic; Jennings had undergone a successful vasectomy in 1976.

A telephone call had been attempted from Newman's telephone at 2:19 a.m. on the night of the crime to the home of Joanne Boeche, a friend of Jennings with whom he had lived in 1981. Boeche did not know Newman. Jennings had attempted to reach Boeche earlier that evening, when he telephoned her from a bachelor party he was attending. Although Jennings had left the party to purchase beer and had returned without any money, he had $10 to $15 in currency and some change when he returned to the party the next morning. Friends of Jennings commented that his hair was wet and he told them he had taken a whirlpool bath. Newman had a whirlpool machine. Jennings was in possession of a folding pocket knife before he left the bachelor party, but the next afternoon he said he had lost it. The bachelor party was held some seven miles away from Newman's house, a drive of 13 to 20 minutes.

When questioned by police officers shortly after the crime, Jennings gave varying accounts of the time he had spent at the bachelor party. Jennings also expressed dismay that someone had raped and stabbed Newman to death. Those details about the crime had not been made public.

Jennings's trial attorney, Michael Oliver, mounted a three-pronged defense. He called a number of Jennings's friends to testify that Jennings had been with them at the bachelor party for much of the night of the crime. A few of those witnesses remembered seeing Jennings between 1:00 and 2:00 a.m., the apparent time of the murder. Several witnesses also testified that Jennings was ingesting methamphetamine at the party, and Oliver argued that Jennings was physically unable

to perform the "acrobatics" necessary to kill Newman and escape undetected. Oliver also presented evidence that a car linked to local burglaries of elderly women's homes had been seen in front of Newman's house around the time of the murder. *See* App. C at 39-40.[2/]

Jennings was convicted by jury of rape, robbery, burglary, and first degree (felony) murder. The conviction was affirmed by the California Supreme Court in 1988. *See* App. D, *People v. Jennings*, 46 Cal.3d 963, 251 Cal. Rptr. 278 (1988).

The Federal Habeas Corpus Investigation And Evidentiary Hearing

Following Jennings's conviction, his federal habeas attorneys collected information from various sources purporting to show that Jennings was incapable of forming criminal intent on the night of Newman's murder. That information included:

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2. Unexpected developments during trial served to weaken Jennings's alibi defense but to strengthen the "other perpetrator" defense. The telephone company representative called by the prosecutor to authenticate Newman's phone records unexpectedly testified that the records had not been adjusted for Daylight Savings Time. Thus, the phone call placed from Newman's phone to the home of Jennings's friend, Joanne Boeche, was actually placed at 2:19 a.m., rather than 1:19 a.m., as the records indicated. That evidence diminished the testimony of the defense witnesses who said they had seen Jennings at the bachelor party between 1:00 and 2:00 a.m. *See* App. C at 40, App. D at 51-52.

On the other hand, the "other perpetrator" defense was "significantly" strengthened late in trial when the courtroom bailiff came forward and provided corroborating testimony about the car seen outside Newman's house around the time of the murder. *See* App. C at 39-40.

(1) declarations from Jennings's family members that he had suffered an extremely abusive childhood and that he had committed abnormal acts throughout his life; (2) medical records showing that members of Jennings's extended family had suffered from schizophrenia and other illnesses; (3) Jennings's military and medical records, indicating injuries he had suffered throughout his life; and (4) declarations from Jennings's friends, who observed him using methamphetamine on the night Newman was killed and during the preceding months. The attorneys presented this information to a psychiatrist, Dr. Karen Gudiksen, who concluded that Jennings was "psychotic and dissociated" at the time of the crime. App. A at 19, 290 F.3d at 1017. Dr. Gudiksen believed Jennings was unable, as a result of his methamphetamine use and underlying mental illness, to form the intent to kill Newman or to commit the related crimes of rape, robbery, and burglary. *Id.*

Jennings filed a federal habeas corpus petition in the District Court, pursuant to 28 U.S.C. § 2254, in 1994. He argued, inter alia, that trial attorney Oliver was ineffective for failing to present Dr. Gudiksen's proposed mental defense in the guilt phase of trial. The District Court held an evidentiary hearing on the claim in 1998, taking testimony from a number of witnesses, including Dr. Gudiksen and the state's expert witness, Dr. James Missett, formerly Deputy Chief of Psychiatry at Stanford University. *See* App. C.

Dr. Missett testified that Dr. Gudiksen's evaluation of Jennings was "highly unreliable." Evidentiary Hearing Transcript at 29. Dr. Missett noted that no one at the bachelor party had described Jennings as behaving strangely, either before or after the crime. *Id.* at 30. Dr. Missett also noted that methamphetamine – the drug ingested by Jennings on the night of the crime – is a central nervous system stimulant: "It is an alerter. It is something that puts someone *more in contact with their surroundings* rather than have them absent themselves from their surroundings." *Id.* at 32 (emphasis added). Dr. Missett concluded, "[T]he likelihood that [the] killing [of

Newman] was committed by someone in a dissociated state is about as close to zero as you can get without stating you're at zero." *Id.*

The District Court also heard extensive testimony from Jennings's trial team, including attorney Oliver and his paralegal. The court ultimately found that Oliver's trial performance was reasonable, for a number of reasons. First, Jennings had been examined by a respected psychiatrist shortly after his arrest and immediately after the guilt phase of trial. That psychiatrist reported no basis for a mental defense and did not request additional information or propose additional testing. Second, Jennings appeared coherent and cooperative with the defense team and insisted he was innocent. He also opposed the presentation of a mental defense. Third, the alibi and other perpetrator defenses were both plausible on their face at the outset of trial, and would have resulted, if successful, in a complete acquittal for Jennings. *See* App. C at 35-41.

The District Court also found many deficiencies in the mental defense proposed by Dr. Gudiksen. First, the court found little evidence that Jennings had suffered an abusive childhood, and no proven link between the alleged mental illness in Jennings's extended family and his mental state on the night of the crime. *See* App. C at 41-43, 46. The court similarly found that Dr. Gudiksen had not adequately explained how Jennings's medical history and his methamphetamine use rendered him incapable of forming criminal intent at the time of the murder. *See id.* at 41-43, 45-46. Finally, the court noted that Dr. Gudiksen's proposed mental defense would have informed the jurors that Jennings had a history of sexually abusing young girls. The court believed it would have been "risky" to present such "highly damaging" evidence on behalf of a client charged with a brutal sex crime. *See id.* at 41, 49.

The Ninth Circuit's Decision

The Ninth Circuit set aside Jennings's murder conviction on the ground of ineffective assistance of counsel. The court found that the alibi defense presented by Oliver ultimately proved "weak and uncorroborated," while there was a "wealth of mental health and drug abuse evidence at the ready" which suggested Jennings was unable to premeditate and deliberate at the time of the crime. The Court concluded that, if a mental defense had been presented, the jury might have convicted Jennings of second degree murder or manslaughter, lesser included offenses of first degree murder. App. A at 22-23, 290 F.3d at 1019.

ARGUMENT

I.

THE NINTH CIRCUIT HAS SET ASIDE A CAPITAL MURDER CONVICTION BY IGNORING THE PREJUDICE PRONG AND COMPLETELY MISAPPLYING THE PERFORMANCE PRONG OF *STRICKLAND V. WASHINGTON*

A. Introduction And Summary

In setting aside Jennings's capital murder conviction, the Ninth Circuit has completely re-written the test for ineffective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Ninth Circuit's primary error was to find that a mental defense might have led Jennings's jury to convict him of a lesser crime to first degree murder, such as second degree murder or manslaughter. That finding flatly disregards California's felony murder rule, which made the killing of Newman first degree murder as a matter of law, without regard to Jenning's mental state, given that the killing was committed during a rape, robbery, and burglary. In short, the Ninth Circuit has taken a substantial step beyond its all-too-frequent disregard of *Strickland*, illustrated in Argument II below. The Court has now declared an attorney incompetent for failing to present a defense which could not have mitigated his client's guilt.

The Ninth Circuit also seriously misapplied *Strickland* in evaluating the trial performance of attorney Oliver. The District Court made a number of factual findings in concluding that the defenses mounted by Oliver were not merely reasonable, but preferable to the mental defense proposed on habeas. The Ninth Circuit generally ignored those findings to conclude, primarily on the basis of hindsight, that a mental

defense would have been preferable. Such persistent disregard of this Court's authority should not continue.

B. *Strickland v. Washington*

A habeas petitioner's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: deficient performance and prejudice. *Strickland v. Washington*, *supra*, 466 U.S. at 687. "The benchmark for judging any claims of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

A habeas petitioner alleging ineffective assistance of counsel must specifically identify the acts or omissions of counsel that are alleged not to be the result of reasonable professional judgment. *Id.* at 690. The evaluation of such allegations must be "highly deferential," focusing on whether counsel's assistance was reasonable "considering all the circumstances." *Id.* at 688.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment. *Id.* at 691. A defendant has the burden of showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In determining whether there is a reasonable probability that particular unprofessional errors would have produced a different result, the reviewing court should look at the totality of the evidence before the trial court to decide whether, absent the error, it is reasonably likely there would have been a different result. *Id.* at 695-696.

C. The Ninth Circuit Wrote The Prejudice Prong Out Of The *Strickland* Analysis

The Ninth Circuit set aside Jennings's capital murder conviction after finding that a mental defense might have led Jennings's jury to convict him of a lesser offense to first degree murder. Specifically, the court concluded that a mental defense might have cast doubt on Jennings's "ability to undertake a `willful, deliberate, and premeditated killing' and to act with malice." App. A at 23, 290 F.3d at 1019.

The Ninth Circuit's conclusion completely disregards California's felony murder rule. Curiously, the Ninth Circuit acknowledged at the outset of its analysis that a homicide can be characterized as first degree murder in California in *two* ways: either when the homicide is "willful, deliberate, and premeditated," or when the homicide is "committed in the perpetration of an enumerated felony," including rape, robbery, and burglary. *See* App. A at 22, fn. 6, 290 F.3d at 1019, fn. 6, *quoting* Cal. Penal Code § 189. The Ninth Circuit also noted that Jennings had been convicted not only of murder, but also of rape, robbery, and burglary. Accordingly, Jennings's first degree murder conviction was not contingent upon any finding that he acted with premeditation, deliberation, or malice. Under California law,

> the two kinds of first degree murder . . . differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. (Footnote omitted.) From this profound legal difference flows an equally significant factual distinction, to wit, that first degree felony murder encompasses a far wider range of individual

> culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

People v. Davis, 7 Cal.4th 797, 838, 30 Cal.Rptr. 50, 77-78 (1994), *quoting People v. Dillon*, 34 Cal.3d 441, 476-477, 194 Cal.Rptr. 390 (1983). *See also People v. Hansen*, 9 Cal.4th 300, 308, 36 Cal.Rptr.2d 609 (1994) ("The felony murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life.").

In short, the Ninth Circuit declared defense attorney Oliver incompetent for failing to present a defense which could not have helped his client. In so doing, the Court read the prejudice prong out of the *Strickland* analysis.

D. The Ninth Circuit Grossly Misapplied The Performance Prong of *Strickland*

The Ninth Circuit showed a similar disdain for *Strickland* in evaluating the trial performance of attorney Oliver. The District Court concluded, after hearing extensive testimony, that Oliver's decision to mount an "alibi/other perpetrator" defense was reasonable. That conclusion was amply supported by the evidence. Preliminarily, Jennings insisted he had not killed Newman, and he opposed the presentation of a mental defense. Jennings said he had spent the night of the murder at a bachelor party and a number of witnesses were willing to provide rough corroboration of the claim. As a result, Oliver

understandably focused his efforts on the alibi defense. As noted in *Strickland*,

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

466 U.S. at 691.

The Ninth Circuit nonetheless disparaged the alibi defense presented by Oliver as "weak and uncorroborated." This was not true at the outset of trial. Indeed, a few of the defense witnesses testified that they saw Jennings at the bachelor party between 1:00 and 2:00 a.m. That testimony was highly exculpatory, given that Newman's telephone records indicated a phone call had been placed from her home by the killer at 1:19 a.m. It is irrelevant under *Strickland* that the alibi was unexpectedly weakened in the middle of trial by the revelation that the call had in fact been placed at 2:19 a.m. While that revelation may have weakened Jennings's defense, it did not, as the Ninth Circuit declared, "destroy" it. In any event, Jennings has never argued (nor could he) that Oliver was

ineffective for failing to discover that Newman's phone records had not been adjusted for Daylight Savings Time, as such a fact could not reasonably have been anticipated. As the District Court noted, "reliance by counsel on the business records of a public utility," without further investigation, is reasonable. *See* App. C at 40, fn. 12. A contrary conclusion can only be derived by hindsight, which is prohibited by *Strickland*:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must over come the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

466 U.S. at 689.

Finally, in evaluating the defenses presented at trial, the Ninth Circuit scarcely even mentioned Oliver's discovery that a mysterious car had been observed near Newman's home shortly before the murder. That aspect of the defense was "significantly" strengthened at the conclusion of trial when the courtroom bailiff provided corroborating testimony about that car. The "other perpetrator" evidence alone might have made a juror reluctant to convict Jennings of capital murder, given that the prosecution evidence, albeit strong, was entirely circumstantial. The Ninth Circuit also ignored Oliver's argument that Jennings's methamphetamine use on the night of the crime made him incapable of performing the acrobatics necessary to kill Newman and escape undetected.

In short, the District Court found Oliver's chosen defenses reasonable, as viewed both at the time of trial (when it mattered most) and in retrospect. The Ninth Circuit, in contrast, ignored the strengths of those defenses, while focusing on weaknesses which only became apparent in hindsight.

The Ninth Circuit also erred in concluding that Oliver should have investigated more thoroughly a mental defense for the guilt phase of trial. As the District Court found, Jennings had been examined shortly after his arrest by a respected psychiatrist who reported no basis for a mental defense. Jennings was a coherent and cooperative client who revealed no sign of mental instability to any member of the defense team. Nor did Jennings's family members and friends provide any information that supported a mental defense.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-691.

Thus, it would have been wasteful for Oliver to spend time, money, and effort investigating a mental defense that was inconsistent with the retained psychiatrist's evaluation of Jennings, with Jennings's version of events, and with Oliver's theory of the case and overall impression of Jennings.

The Ninth Circuit further erred by embracing at face value Dr. Gudiksen's conclusion that Jennings was unable to form criminal intent on the night of the crime. Again, the District Court found that many of the factual allegations supporting Dr. Gudiksen's proposed mental defense had not been proved (or were affirmatively disproved) at the evidentiary hearing (e.g., the allegations that Jennings had been abused as a child). The District Court also found that Dr. Gudiksen had failed to adequately explain how Jennings's drug use and alleged mental illness prevented him from forming criminal intent on the night of the murder.

The District Court's conclusions were supported not merely by the testimony of Stanford psychiatrist Dr. Missett, but also by common sense. The undisputed evidence showed that Jennings had (1) made a 13-20 minute drive from the bachelor party to Newman's house, (2) made his way into the house after midnight, (3) tied Newman up with a rope and tape before raping and repeatedly stabbing her, (4) removed a wallet, a checkbook, and a telephone answering machine from Newman's house, (5) took a shower or whirlpool bath (presumably to wash off blood), (6) placed a phone call from Newman's phone, (7) left the house with all doors locked and the windows closed, (8) drove back to the bachelor party, (9) disposed of the murder weapon, and (10) told his friends, when asked why his hair was wet, that he had taken a whirlpool bath. If this were not enough, Jennings revealed to police officers within days of the crime that he knew Newman had been raped and stabbed to death, all details which had not been disclosed to the public. Under the circumstances, Jennings's ability to form criminal intent on the night of the crime was undeniable. No reasonable juror would have believed Dr. Gudiksen's testimony to the contrary.

Finally, the Ninth Circuit overlooked the fact that Dr. Gudiksen's proposed mental defense necessarily would have informed the jury that Jennings had committed a series of brutal sexual assaults against young girls when he was a young man. Such evidence would have been devastating at Jennings's trial

for the savage rape and murder of a 62-year-old woman.

In sum, the Ninth Circuit ignored all the strengths of Oliver's trial strategy and the weaknesses of the mental defense proposed on habeas. In so doing, the court turned *Strickland* on its head.

II.

THE NINTH CIRCUIT IS UNDERMINING THIS COURT'S PRECEDENTS REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL BY ROUTINELY USING HINDSIGHT TO SECOND-GUESS THE REASONABLENESS OF TRIAL ATTORNEYS'S DECISIONS

The Ninth Circuit's opinion in *Jennings* violates *Strickland* in every material way. The opinion becomes even more significant when viewed as the latest in a series of cases in which the Ninth Circuit has set aside death sentences by using hindsight to second-guess trial counsel's decisions, rather than applying *Strickland*'s strong deferential presumption that counsel's conduct "might be considered sound trial strategy." 466 U. S. at 689.

In *Karis v. Calderon*, 283 F.3d 117 (9th Cir. 2002), *cert. pending*, the Ninth Circuit set aside Karis's death penalty after finding that the defense attorney had failed to present mitigating evidence that Karis had been abused as a child. The court disregarded evidence that Karis's attorney had decided not to introduce such evidence for three strategic reasons: (1) Karis's mother had denied the abuse and had lied to the police, (2) neither Karis nor his mother wanted the attorney to pursue the mother's "prior life," and (3) the attorney was concerned that extensive questioning of Karis's mother at the penalty phase would open the door to damaging background information about Karis. In short, the Ninth Circuit's opinion in *Karis* manifests an absolute proposition that a less than complete investigation of potential mitigation is unreasonable,

even if reasonable professional judgments support the limitations on investigation.[3/]

There have been a host of similar cases. In *Caro v. Calderon*, 280 F.3d 1247, 1257 (9th Cir. 2002), *cert. denied*, __ U.S.__, 122 S.Ct. 2645, 153 L.Ed.2d 823 (2002), capital defendant Caro was examined by four experts before trial, and none indicated that Caro suffered from a mental impairment severe enough to constitute legal insanity or diminished capacity. The Ninth Circuit nonetheless set aside Caro's death sentence on the ground that trial counsel had unreasonably failed to investigate the effects of exposure to pesticides on Caro's mental health. In *Phillips v. Woodford*, 267 F.3d 966, 972, 978-980 (9th Cir. 2001), the court found a defense attorney ineffective for not investigating other potential defenses, even though the defendant insisted his defense was alibi. In *Wade v. Calderon*, 29 F.3d 1312, 1323-1325 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995), the court declared defense counsel ineffective for summoning the defendant's "alternative personality" during the penalty phase of trial to demonstrate the mitigating factor of "extreme mental or emotional disturbance." In *Jackson v. Calderon*, 211 F.3d 1148, 1161-1162 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001), the court found that counsel had unreasonably failed to investigate and produce evidence of the defendant's difficult childhood, even though the defendant did not provide any such information and his wife described his relationship with his mother as good and affectionate. In *Rios v. Rocha*, 299 F.3d 796, 805-807 (9th Cir. 2002), the court faulted an attorney for presenting an unconsciousness defense over a misidentification defense, even though the attorney's decision was made after talking to the defendant, reading the police report of the offense, reviewing a psychological report of the defendant, and speaking to an eyewitness. In *Gentry v. Roe*, 300 F.3d 1007 (9th Cir. 2002) the

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3. The State submitted a petition for writ of certiorari to this Court in *Karis* on September 13, 2002.

court found defense counsel ineffective for admitting – in the face of the defendant's weak testimony – that only the actual participants, not the attorneys, knew what really happened during the crime. In *Silva v. Woodford*, 279 F.3d 825, 837-840 (9th Cir. 2002), *cert. denied*, 2002 WL 1304918, 70 USLW 3775 (Oct. 7, 2002), the court faulted an attorney who chose not to investigate the defendant's background evidence because the defendant had threatened to disrupt the trial and make the jury hate him if the attorney contacted his parents.

In short, the Ninth Circuit is routinely subverting *Strickland* by failing to give deference to the reasonable professional judgments of counsel.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Dated: October 16, 2002

Respectfully submitted,

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